IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

THE STATE OF RAJASTHAN. V. SAMIYA AND OTHERS.

D. B. CRIMINAL APPEAL NO. 38/86

Under Section 378 (iii) (i),Cr.P.C.,against the Judgment dated 30-09-1985, passed by Mr.M.L.Vyas, RHJS, the learned Sessions Judge, Jalore, in Sessions Case No.46/84.

DATE OF JUDGMENT :::: SEPTEMBER 06, 2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. J.P.S.Choudhary, Public Prosecutor.
Mr.B.S.Rathore for the respondents.

BY THE COURT: (PER HON'BLE BHANDARI, J.):-

Aggrieved by the judgment dated 30.09.1995 passed by the learned Sessions Judge, Jalore in Sessions Case No. 46/84, State has preferred this appeal.

The prosecution case was started by lodging First Information Report by Hema on 10.10.1984 with Police Station Modara. It was stated that his younger sister Dhepi married to Kesa S/o Prabhu Rebari. Today morning his nice Anchi came and informed that her father is beaten by someone. When he visited Kesa's place along with his nice then it was found that Kesa was lying on a cot having injury on his head. On inquiry, Kesa's father Prabhu and Kesa's wife Dhepi informed that on the faithful night of occurrence Kesa visited Bheek Singh S/o Heera Singh but he did not return thereafter, the following morning Jhunja, Prabhu, Dhepi brought Kesa in an unconscious condition. After some time Kesa died. In the report, it was further stated that complainants have no knowledge about the fact as to who fought with Kesa, however, they had visited seen of occurrence and there it was found that the exist foot prints of two persons which were going around 200 yards towards "Bagario Ka Bera". At that place some blood as well as "chilam" of deceased Kesa was found. When the foot print was further followed then it was found that it ended at Samiya, Sujia and Babuda's Bera. On the basis of those foot prints complainant shown his suspicion against Samiya.

First Information Report was thereafter registered being No.80/84 for an offence under Section 302 IPC, police conducted

usual investigation and thereafter challan was filed against Samiya and Kuhia before Munsif and Judicial Magistrate, Bhinmal from where the case was committed to the trial court.

The Trial Court framed charges against the accused under Section 302 and 302/34 IPC. Charges were read over to the accused who denied the charges and claimed trial.

At the trial, 16 witnesses were produced and 25 documents were exhibited by the prosecution to prove their case. Defence produced one witness and exhibited one document. The statements of accused were recorded under Section 313 Cr.P.C.

After taking note of entire material, the trial court did not find prosecution case sufficient to prove guilt of accused under Section 302 and 302/34 IPC. Accordingly, the trial court acquitted both the accused by giving them benefit of doubt.

Learned Public Prosecutor appearing for the State submitted that judgment of the trial court is not proper as trial court has failed to take cognizance of material available on record which was sufficient to prove the prosecution case beyond doubt. It was further submitted that statement of P.W. 9 Deva Rebari was totally ignored coupled with ignorance of important fact of recovery of

blood stained weapon and cloth of accused which was matching to the blood group of deceased. Learned Public Prosecutor therefore, prayed that judgment of the trial court is not sustainable hence same may be set aside and accused be convicted and sentenced under the provisions of Section 302 and 302/34 IPC.

Per contra, counsel appearing for the accused submit that finding recorded by the trial court is based on material available on record. Prosecution had tried to prove their case based on suspicion which was not accepted by the trial court, therefore, no defect exists in the judgment of the trial court. Learned counsel further urged that prosecution had tried to prove their case with corroborative piece of evidence only whereas a case cannot be proved on the basis of corroborative piece of evidence alone. Hence, trial court has rightly given benefit of doubt to the accused and acquitted them from the charge under Section 302 and 302/34 of IPC.

We have considered the rival submissions of the parties and scan the matter carefully.

The present case is a case based on circumstantial evidence as there is no witness who has seen the occurrence, therefore, it is necessary to judge this matter after applying cardinal principle

reiterated by Hon'ble Apex Court in a recent judgment of Manjunath Chennabassapa Madalli Vs. State of Karnataka (Jt 2007 [3] SC 550). It was held thus :

> "**8.** We may also make a reference to a decision of this Court in **C.Chenga Reddy and Others v. State of Andhra Pradesh (JT 1996 (6) SC 397),** wherein it has been observed thus :
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> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...."
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> **9.** In **Padala Veera Reddy v. State of A.P. and Others (JT 1989 (4) SC 223),** it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :
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> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
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> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

10. In **State of U.P. v. Ashok Kumar Srivastava (JT 1992 (1) SC 340),** it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

11. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which

infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted"

12. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the Court as far back as in 1952.

13. In **Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh (1952 SCR 1091),** wherein it was observed thus :

> "It is well remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be

such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

14. A reference may be made to a later decision in **Sharad Birdhichand Sarda v. State of Maharashtra (1985 (1) SCR 88).** Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

> (4) they should exclude every possibility hypothesis except the one to be proved; and
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> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability he act must have been done by the accused."

Applying these principles laid down by the Hon'ble Apex Court we have to scan this matter as to whether prosecution could prove its case beyond doubt by showing chain of circumstances to connect accused with the crime. The case was initiated on the registration of the report of Hema stating that deceased Kesa was found unconscious and was seen first by Jawar Singh who gave this information to Junjha. Junjha, Prabhu and Dhepi brought Kesa who thereafter died. The suspicion was shown by the complainant against accused Samiya based on foot print impression. During the course of investigation, accused Samiya and Kuhia were arrested vide Ex.P-9 and P-10 on 13.10.1984 who were wearing blood stained shirts. Their shoes were recovered by the police for verification of foot prints.

P.W. 9 Deva Rebari in his evidence had stated that around seven months back he was coming back to his 'Bara' then on the

way he saw two persons near Jawar Singh's Well. Those two persons were accused Samiya and Kuhia. The witness further stated that Kesa Ram was found lying there and asking, two accused stated that Kesa is over drunk, thus, lying there. After three days, he heard that Kesa is being killed. In cross examination said witness stated that he cannot state as to who informed him about the death of Kesa. In cross examination witness could not state the day when he had seen the accused and deceased Kesa, rather contradictory statement in regard to the day was made. He further stated that he had not informed about this fact to anyone except Hema. It was admitted that even he did not inform Hema that Kesa was over drunk.

P.W.10 Dhepi stated that her husband visited Bheek ji Rajput on the faithful night of the occurrence and on the following morning Junjha informed that her husband Kesa is lying in Kesa - Magra. Kesa was having head injury and blood was coming from the wound. Kesa was not in a condition to speak anything. Witness further stated that there were certain heat exchanges between her husband Kesa and Samiya for distribution of crops. The said witness has not attributed any allegation against accused except a fact that foot print was seen by others which foot prints were going to the place of accused. P.W. 11 Jawar Singh stated that he had seen deceased Kesa lying on the way while he reached near Madu Singh's Well. Kesa was having head injury. The witness did

not talk to deceased Kesa despite of his condition and went ahead from the place, however, witness stated that he informed about Kesa to Jhunjha Rebari. Again this witness has also not stated any fact against accused. P.W.13 Jhunja stated that Jawar Singh informed him that his brother-in-law deceased Kesa is lying near Madu Singh's well and when he reached to the place where Kesa was lying then it was found that he had sustained head injury. He thereafter informed about the incident to Prabhu and Dhepi who thereafter brought Kesa, however, Kesa died after sometime. The witness further stated that he had seen foot prints of two persons which were going upto Samiya's well. P.W.1 Hema shown his suspicion against Samiya and Kuhia on account of foot print.

P.W.5 Dr.Tara Chand stated that he had conducted post mortem of deceased Kesa who was having deep wound on his head and few simple injuries on knee joint and shoulder joint. In his opinion cause of death was due to excessive bleeding and head injury which was found sufficient to cause death in ordinary course. P.W.15 Narayan Singh stated that he has received written report of Hema while working on the post of Police Station concerned. He visited on site on the information of complainant Hema. He had collected blood stained soil from the two places and at the same time recovered 'Chilam'. For taking foot print he had informed and, thereafter on 12.10.84 ASI Sardar Khan taken mould of foot prints. The witness further stated that at the time of

arrest, Samiya was found wearing blood stained shirts which was recovered and sealed vide Ex.P-11. Foot print of Samiya was also taken. Kuhia was also arrested wearing blood stained shirt which were sealed vide Ex.P-12. The weapons were also recovered at the instance of accused and all those articles were found to be blood stained matching to the blood group of deceased.

The learned trial court after taking note of all material available on record found that it is being a case of circumstantial evidence thus prosecution was required to prove their case by connecting accused with the crime. However, according to the trial court prosecution failed to do so on. Thus accused were given benefit of doubt.

After considering the material available on record we find that appellant mainly relied on the statement of P.W. 9 Deva Rebari to show that as per his statement accused was last seen with the deceased. The prosecution further laid their emphasis regarding recovery of blood stained clothes and weapons at the instance of accused and lastly foot prints matching to the foot size of the accused. Thus it was projected that these circumstances are sufficient to show that two accused were involved in the case.

It is to be noted that occurrence took place on faithful night of 10.10.1984 whereas the accused were arrested on 13.10.1984 and according to the Investigating Officer P.W. 15 Narayan Singh those accused were wearing shirts found to be blood stained which were

then recovered while arresting the accused after three days of occurrence. The statement of Narayan Singh seems to be unreal and unnatural because if two accused would have caused injury to deceased Kesa then a man of common prudence would not have kept the same shirt for more than three days, more so when it was blood stained. Investigating Officer Narayan Singh has not stated that those clothes were recovered from elsewhere but as per his statement, shirts were recovered from the accused as they were wearing it, at the time of arrest. In any case recovery of blood stained clothes would be a corroborative piece of evidence and prosecution cannot prove its case based on corroborative evidence itself. Unless there is subsistence evidence to prove crime.

If we take statement of P.W. 9 Deva Ram into consideration then also it is seen that there is no corroboration of his statements though prosecution projected said witnesses to have last seen the deceased with accused. Said witness Deva Ram stated that he did not state the fact pertaining to existence of two accused while Kesa was lying on the way to anyone other than Hema. However, in the statement of Hema this fact has not been corroborated, thus statement of Deva Ram becomes doubtful hence not safe to rely. Again it is corroborative piece of evidence.

g So far as the case of the prosecution with regard to foot prints is concerned, it is not safe to convict accused on the basis of the opinion of foot print. There is distinction between foot print

and finger prints for the purpose of holding anyone guilty of a crime. Foot print cannot be given so much credence as otherwise is given to the finger prints more so when in the present case foot prints were judged from the shoe and not from the foot itself, therefore, the trial court has not given much weightage to the material pertaining to the opinion on foot print. We find that no witness has attributed allegation of murder against accused except showing their suspicion based on foot prints and it is seen that the prosecution relied its case based on suspicion and developed evidence to prove their case otherwise P.W.10 Dhepi, P.W.11 Jawar Singh and P.W.13 Jhunja and P.W.1 Hema have not specially attributed allegation against the accused. Thus, in the present case, prosecution was having no cogent proof of crime against the accused, therefore, used only corroborative piece of evidence. However, as we have recorded that corroborative piece of evidence itself is not sufficient to prove prosecution case.

The Hon'ble Apex Court has already held that in a case of circumstantial evidence the circumstances from which the inference of guilt is sought to be drawn, must be cogent and firmly established and those circumstances should be of definite tendency pointing out the guilt of accused. However, in the present case we did not find that prosecution could establish any circumstance cogent and firmly showing definite tendency pointing out towards guilt of accused. In the case of circumstantial evidence conviction

can be sustained if it is incapable of explanation of any other hypothesis then that of guilt of accused and such evidence should not only be consistent with the guilt of accused but should be inconsistent to his innocence. Again applying this principle this is not a case where circumstantial evidence is complete and incapable of explanation of any other hypothesis. We have already considered the statement of all witnesses and also taken note of corroborative piece of evidence but based on said material it cannot be said that prosecution could prove its case beyond doubt. Therefore, we are in agreement with the finding of the trial court.

In view of the above, we dismiss the appeal preferred by the State and affirm the Judgment of the Trial Court.

(MUNISHWARNATH BHANDARI),J. (BHAGWATI PRASAD),J

Mamta.